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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 914

THE PENNZOIL COMPANY, A CORPORATION OF CALIFORNIA,

AND

THE PENNZOIL COMPANY, A CORPORATION OF PENNSYLVANIA,

Petitioners,

VS.

CROWN CENTRAL PETROLEUM CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

In this case, the plaintiffs in their petition for the Writ of Certiorari have attempted to make it appear that the plaintiffs, by some action or ruling of the lower Courts,

have been denied the benefits of the Trade Mark Act of 1905. The plaintiffs allege in their said petition, in this Court filed, that the District Court below held, that the respondent's mark "Greenzoil" is a colorful imitation of the plaintiffs' mark "Pennzoil". The plaintiffs argue that because of this finding, the plaintiffs have been denied the benefit of the Trade Mark Act. It so happened that the Court below did not so find; otherwise, judgment would have been entered for the plaintiffs on the issues drawn and submitted in the District Court. What the Court found was, *no infringement, no colorable imitation,* and *no unfair competition,* accordingly, judgment of the District Court was for this respondent, Crown Central Petroleum Corporation, the defendant below, which judgment on appeal was affirmed by the Fourth Circuit Court of Appeals, said Court adopting the opinion of the District Court as its opinion.

An examination of the record filed with the plaintiffs' petition for Certiorari shows judgment by the District Court below entered for the defendant, Crown Central Petroleum Corporation, respondent here (see Record, page 48), finding of facts (see Record, pages 38 to 47), conclusions of law (see Record, page 47), District Court's opinion (see Record, pages 19 to 38). On plaintiffs' appeal, for action of the Fourth Circuit Court of Appeals, judgment of the lower Court "affirmed" (see Record, page 486), for adoption of the District Court's opinion as the opinion of the Fourth Circuit (see Record, page 486).

Comparing the record with the allegations on which the plaintiffs base their application for Certiorari, it is apparent, that the questions raised and assigned are not borne out by the record, and accordingly, are unsubstantial, and that the arguments advanced by the plaintiffs in support thereof, are frivolous, and without merit.

Further reviewing the record, it will appear that all issues drawn and submitted after argument were decided adversely to the plaintiffs by the District Court and the Circuit Court of Appeals. Furthermore, in the District Court, after entry of judgment for this respondent, the plaintiffs did not file any objections to the Court's findings of facts or conclusions of law, or move for a new trial, nor did the plaintiffs, on their appeal to the Fourth Circuit, after judgment of the District Court had been affirmed, move for a rehearing, file any exceptions or objections whatsoever, or point to any error in any ruling on the facts or the law, or, to a denial to the plaintiffs of any right under any statute, federal or state, or that the law as applied, was in conflict with a decision of any other Circuit, or, that the findings of the Court, were contrary to the weight of authority.

WHAT ARE THE FACTS?

On April 1, 1942, the plaintiffs filed in the District Court their amended and substituted Bill of Complaint against this respondent, alleging infringement of the plaintiffs' mark, "Pennzoil", and unfair competition by this respondent in the use of its mark, "Greenzoil" on motor lubricating oils (Record, page 1).

The plaintiffs have a refinery at Rouseville, Pa. (Record, page 45), and their product is claimed by them to be 100% pure Pennsylvania oil (Record, page 24), known to the trade as a paraffine base product (Record, page 20). This respondent has a refinery at Houston, Texas (Record, page 21), and its products of lubricating oils are made from Texas or other crude oils known to the trade as an asphalt or napthene base product. (See Court's opinion, Record, pages 20 and 26).

The color arrangement and style of cans used by plaintiffs and this respondent in the distribution of these products are fully set out in the lower Court's opinion. The lower Court said, describing the labels, color scheme on cans, designs, and the name and address of the respective makers, *"as having no similarity"*, (See Record, page 24). The Court further found, *"no infringement or unfair competition, actual or constructive"*, (See Record, page 47).

The plaintiffs' petition for certiorari rests on an alleged finding of the District Court; viz., that the respondent's mark "Greenzoil" is a colorable imitation of the plaintiffs' mark "Pennzoil", (see plaintiffs' Brief, page 8) and because of this alleged finding, the plaintiffs argue that they have been denied the benefits of the trade mark act, as the Court, notwithstanding the alleged finding, entered judgment for this respondent, which judgment was affirmed by the Court of Appeals (4th Circuit). The fact that judgment below was entered for this respondent and affirmed on appeal indicates that consideration was given to the provisions of the trade mark act, and as there was no evidence of colorable imitation, none of the acts of this respondent amounted to infringement or unfair competition. It is unfortunate that the plaintiffs, to make it appear that some right has been denied them, should resort to allegations not borne out by the Record, and merely for the purpose of making a showing, misquote what the Court did say, as applied to the facts in this case.

So that this Court will not be misinformed as to what the lower Court did say, we refer to the District Court's opinion, and quote what the Court did say, as applied to the facts in this case, on the question of "colorable imitation". Under the heading, "Is Greenzoil a colorable imitation of Pennzoil?", the Court said, "I think not—in the circumstances here present." (See Record, page 31.)

ARGUMENT

The granting of a writ of certiorari being one of discretion this Court will not issue the writ for the purpose of a retrial by this Court of matters tried and adversely decided against the applicants by the District Court and the Circuit Court of Appeals.

Mr. Justice Holmes, in the case of Joseph Schlitz Brewing Company vs. Houston Ice Company, reported in 250 U. S. 28, 63 L. ed. 822, said, "Whether, upon inspection, it can be said as a matter of law that the admitted acts of the defendant are a wrong of which the plaintiff can complain, is the only question which the Federal Supreme Court will consider in a trade mark or unfair competition suit in which both Courts below have found for the defendant."

In the case of, Re Lau Ow Bew, 141 U. S. 583, 35 L. Ed. 868, this Court said, "The power will be exercised sparingly and only when questions of gravity and importance are involved."

See also, In re Woods, 143 U. S. 202, 36 L. ed. 125; Forsyth vs. Hammond, 166 U. S. 506, 41 L. ed. 1095.

From other cases decided by this Court, we quote the following, "The concurrent findings of the two lower Courts * * * will be accepted by the Federal Supreme Court * * * unless clearly erroneous." The Germanic (Oceanic Steam Nav. Company vs. Aitken), 196 U. S. 589, 49 L. ed. 610.

In Alabama Power Company case vs. Ickes, 302 U. S. 464-477, 82 L. ed. 374-377, the Court said, "Findings which have substantial support in the evidence will be accepted by the reviewing Court as unassailable." (Findings not questioned in the Court below.)

In General Talking Pictures Corp. vs. Western Electric Company, 304 U. S. 175, 82 L. ed. 1273, it was said, "The Supreme Court of the United States will not grant a writ of certiorari merely to review the evidence or inferences drawn from it."

See also, Anderson vs. Abbott, U. S. Advance Sheets, Vol. 88, No. 10, page 535.

From this case, we quote the following, "Where no clear error is shown, the Supreme Court of the United States will accept findings of facts concurred in by a Federal District Court and the Circuit Court of Appeals."

Rule 38 of the Supreme Court, paragraph 5, provides: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The rule further provides, *while neither controlling nor fully measuring the Court's discretion,* sub sec. 5 B of the rule indicates *the character of reasons which will be considered as a guide for the Court's exercise of its discretion.*

Applying the rule above stated and the various decisions of this Court, none of the questions assigned by the petitioners are of a character mentioned in the rule or in sub-section 5 B thereof, or, are they of sufficient importance to invite this Court's attention.

The plaintiffs, having had their day in the District Court and in the Fourth Circuit Court of Appeals, to grant the writ of certiorari in this case based on any of the grounds assigned by the plaintiffs, would merely afford the plaintiffs the opportunity of another day in Court for a retrial by this Court of the matters and facts submitted below, on which judgment was entered for this respondent and affirmed on appeal, the Court of Appeals (Fourth Circuit) adopting the District Court's opinion as its own (Record, page 486).

CONCLUSION

In our opinion, the case below never reached a point of higher dignity than any ordinary trade mark case, and no questions that the plaintiffs raised were left unanswered, or do they require any further clarification.

It appearing that the plaintiffs' application for a writ of certiorari not being based on any grounds of a substantial character, or involving any erroneous findings of fact, or of law, application for the writ should be denied, with costs.

Respectfully submitted,

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